

# EAST TIMOR'S TORTURED MARCH TO STATEHOOD: A TALE OF LEGAL EXCLUSION & THE VAGARIES OF REALPOLITIK

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## I ABSTRACT

This article examines East Timor's journey towards self determination from the earliest Portuguese colonial occupation, through conflict with the Dutch and annexation by Indonesia. In particular it seeks to examine the tenets of self-determination and the practical dynamics that yielded little protection to the aspirations of the East Timorese by exploring the nexus between the principle of self-determination and the geopolitics that contributed to East Timor's tortured march to independence.

The article will critically analyse the response of the United Nations and the wider community to the violent Indonesian occupation, and suggest that regional political pragmatism often prevailed over the rights of the East Timorese people. The advent of the modern concept of self-determination will also be under analysis, which shows that, during the 20th century, global realpolitik<sup>1</sup> continued to dominate the lives of the East Timorese, and that the utterances of self-determination made by the United Nations were absent from a real desire to see a free East Timor.

## II INTRODUCTION

Portuguese presence in Timor Island dates back to the sixteenth century. It officially became a Portuguese colony in 1702. Timor was a vestigial appendage of the Portuguese empire, largely neglected and used mainly as a place to exile Portuguese political dissidents, failed professionals and

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1 Realpolitik is a word of German origin and literally means: 'practical politics'. It is broadly used in this article to denote power politics designed to produce or achieve certain desired outcomes whether based on legal, moral or ideological considerations in a domestic, regional or international setting.

incompetent bureaucrats.<sup>2</sup> During the eighteenth century, the Dutch aggressively sought to create the Dutch East Indies by settling the Timor Island and the surrounding archipelago. Repeated attacks by the Dutch led the Portuguese to move the capital of their Timor colony from Lifau to Dili (East Timor's present day capital). After decades of hostility Portugal and the Netherlands signed the Treaty of Lisbon in 1859, which formally ceded the western part of the Timor Island to the Dutch, with the Portuguese retaining the eastern part. By the twentieth century East Timor's status as a colony of Portugal with an independent socio-political identity, was well established.

In the course of World War II, Japan occupied the Indonesian Archipelago, but Australian and Dutch troops were deployed to East Timor in 1941 to prevent invasion by Japanese forces. Following a protest by the then Portuguese governor at the Dutch occupation, the Dutch troops were withdrawn to the Dutch side of the island and the remaining Australian contingent was soon forced out of Dili by the Japanese. A year long battle for control of East Timor ensued. After the Allied victory, Indonesian nationalists under Sukharno, with the help of indigenous army units created by the departing Japanese, declared independence on 17 August 1945, proclaiming the Republic of Indonesia.

With the Netherlands weakened after being freed from German occupation, the Indonesian Republicans rapidly gained control of vast areas of the Archipelago consolidated their territorial and political hold. The Dutch attempted to regain their territory but after four years of unsuccessful military action, they were forced to accede to the Republicans on 27 December 1949. Meanwhile, East Timor had been handed back to the Portuguese by the victorious Allies.

With the Indonesian Republicans occupied with wrestling with the Dutch for control of West Irian and New Guinea (which the Dutch tenuously held), East Timor was left alone and in fact Sukharno acknowledged it as a Portuguese colony. The status quo remained until 1974 when the Portuguese fascist regime fell in Lisbon in the wake of the 'Carnation Revolution'. The Revolution came amidst a three front war between Portugal and its colonies

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2 As John Magro notes:

It was apparently a dumping ground for political dissidents, failed professionals and incompetent bureaucrats...Portuguese officials dubbed the island 'antecamara do inferno' (gateway to hell), because the island was plagued by malaria and other tropical diseases.

John Magro, 'Is there Justification for an International Criminal Tribunal for East Timor?' (2000) 7 *Murdoch University Electronic Journal of Law*, para 12, available at [www.austlii.edu.au/au/journals/MurUEJL/2000/30.html](http://www.austlii.edu.au/au/journals/MurUEJL/2000/30.html) at 15 October 2007.

in Angola, Mozambique and Guinea-Bissau which had strained its meagre financial resources and run down its economy leaving Portugal in dire financial strife. The economic and financial woes fuelled an appetite by the new Portuguese leadership to jettison its colonial possessions through grants of independence with the policy spreading to East Timor.<sup>3</sup> The new democratic regime in Lisbon wasted no time in encouraging East Timorese independence. A new Portuguese governor arrived in East Timor determined to oversee East Timor's transition to independence. The colonial power wanted to focus on its own turbulent internal affairs after the 'Carnation Revolution'. Political parties were encouraged in East Timor with three dominant factions emerging; the Timorese Democratic Union (UDT), the Revolutionary Front of Independent East Timor (Fretilin) and the Timorese Popular Democratic Association (Apodeti).

In the lead up to the local elections in 1975, UDT and Fretilin emerged as the two largest parties and formed an alliance to campaign for independence. However the Indonesian government was unhappy with what it perceived to be a very Marxist leaning Fretilin and the government was concerned that Fretilin would act as an inspiration for some of the independently minded provinces, particularly Aceh and West Irian. On the other hand, the other chief regional player, Australia, saw East Timor as an unviable state that would only serve to undermine stability in the region.<sup>4</sup> In any case Australia was arguably more interested in robust ties with the Indonesian government in charge of a vast, resource-rich archipelago. It was only a matter of time before East Timor found itself cut adrift. The powder keg was ignited on 28 November 1975 when Fretilin made a unilateral declaration of independence in the face of a UDT engineered coup d'état supported by Indonesia aimed to curb Fretilin's growing popularity. The explosion occurred nine days later when, despite the marginal economic value of East Timor in proportion to Indonesia's extant possessions,<sup>5</sup> and in the face of international condemnation, Indonesian military forces invaded and subdued East Timor.

Without effective local opposition, Indonesia absorbed and annexed East Timor in July 1976 declaring it to be its 27<sup>th</sup> province, but the integration

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3 As above, n 2, para 18.

4 William Burr & Michael L Evans eds, *Ford, Kissinger And The Indonesian Invasion, 1975-76* (2001); Andrea Hopkins, 'Australia let Indonesia invade East Timor in 1975', *The Guardian*, 13 September 2000 available at <http://www.guardian.co.uk/international/story/0,,367658,00.html> at 14 October 2007; Anup Shah, 'Crisis in East Timor', 12 December 2001 available at <http://www.globalissues.org/Geopolitics/EastTimor.asp> at 13 October 2007.

5 Thomas D Grant, 'East Timor, The UN System, And Enforcing Non-Recognition In International Law', (2000) 33 *Vanderbilt Journal of Transnational Law* 273, 297.

remained controversial at the international level. The annexation was never recognised by the United Nations (UN) which, following the invasion, called on Indonesia to withdraw from East Timor and to respect the East Timorese's right to self-determination,<sup>6</sup> with the UN naming Portugal the Administrator of the territory. In addition the UN called upon Portugal to stop the violence and to effect an act of free choice in their former colony.<sup>7</sup> Recognition of Portugal's interest in East Timor was an attempt to move protection of East Timor from theory to action despite Portugal's abandonment of the colony and abnegation of political responsibility. The supposed right of self-determination, well established in international legal theory and theoretically possessed by the people of East Timor in 1975<sup>8</sup> was however functionally irrelevant to the Indonesians when they swept through the Island to begin more than three decades of oppressive rule.

The Indonesian action was certainly abetted by the indifference of the major powers in the West<sup>9</sup> since western capital regarded Indonesia as a 'prize'.<sup>10</sup> Leading commentator and author John Pilger eloquently notes: 'No help came, because the western democracies were secret partners in a crime as great and enduring as any this century; proportionally, not even Pol Pot matched Suharto's spree. Air Force One, carrying President Ford and his secretary of state Henry Kissinger, climbed out of Indonesian airspace the day the bloodbath began.'<sup>11</sup> Quoting Philip Leichty, a CIA officer, Pilger notes that Ford and Kissinger effectively gave Suharto the green light with '[t]he invasion was delayed two days so they could get the hell out'.<sup>12</sup> More damningly, the CIA

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6 General Assembly Resolution (GAR) 3485, UN General Assembly Official Record (UN GAOR), 30th Sess, Supp. No. 34, at 118, UN Doc A/10634 (1975); GAR 34/40, UN GAOR, 34th Sess, Supp. No. 46, at 206, UN Doc A/34/46 (1979); and GA Res 37/30, UN GAOR, 37th Sess, Supp. No. 51, at 227, UN Doc A/37/51 (1982); see also Security Council Resolution (SCR) 384, UN Security Council Official Record (SCOR), 30th Sess, 1869th mtg., at 10, UN Doc S/INF/31 (1975); and SCR 389, UN SCOR, 31st Sess, 1914th mtg., at 18, UN Doc S/INF/32 (1976) [UN East Timorese Resolutions].

7 UN East Timorese Resolutions, as above, n 6.

8 UN East Timorese Resolutions, as above, n 6.

9 As above, n 4. In a crisp, incisive observation, Anup Shah notes:

Unfortunately, yet predictably, there was one-sided media coverage of the crisis in East Timor by major media institutions in the West (especially from nations that continuously supported the often brutal regime). Most mainstream coverage failed to trace back the root causes for such gross violations (i.e. the fact that East Timor has oil, timber and other rich resources and that Indonesia is strongly anti-Communist, which helped western backers ignore brutal crimes and therefore continue 'business as normal').

Anup Shah, 'Crisis in East Timor', 12 December 2001 available at

<http://www.globalissues.org/Geopolitics/EastTimor.asp> at 13 October 2007.

10 John Pilger, 'Jakarta Godfathers', *The Guardian*, 7 September, 1999 available at <http://www.johnpilger.com/page.asp?partid=194> at 14 October 2007).

11 As above, n 10.

12 As above, n 10.

was ordered to give the Indonesian military everything they wanted. In the words of Leichty: 'I saw all the hard intelligence; the place was a free-fire zone.'<sup>13</sup> Women and children were herded into school buildings that were set alight—and all because we didn't want some little country being neutral or leftist at the United Nations.'<sup>14</sup> This indifference was to dominate East Timor's quest for self-determination prompting J. C. Beauvais to note that: 'East Timor's accession to statehood bears an international significance disproportionate to its tiny size and severe poverty.'<sup>15</sup>

With *realpolitik* ascendant, the next three decades were a tale of brutality and atrocity orchestrated by Indonesian forces' heavy-handed tactics designed to wipe out guerrilla resistance and effectively 'pacify' East Timor. The battle that raged would in the next two decades kill thousands as Indonesian police forces regularly detained, tortured innocent civilians and brutally suppressed peaceful protests.<sup>16</sup> The massive and persistent violence began to increasingly harden the international community's support for East Timor's independence.<sup>17</sup> The turning point was the Dili Massacre on 12 November 1991 in which over 250 unarmed youth were mowed down by Indonesian military personnel at the Santa Cruz Cemetery.<sup>18</sup> Hundreds more were injured or simply disappeared.<sup>19</sup>

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13 As above, n 10.

14 As above, n 10.

15 Joel C Beauvais, 'Benevolent Despotism: A Critique of UN State-Building in East Timor' (2001) 33 *New York University Journal of International Law and Politics* 1101, 1102.

16 See generally Peter Carey, 'East Timor: Third World Colonialism and the Struggle for National Identity' (1996) 293/294 *Conflict Studies* 1 (1996) (describing effects of Indonesian invasion); Barbedo de Magalhães, 'East Timor: A People Shattered By Lies and Silence', (July 17, 1996) <<http://www.uc.pt/timor/silence.htm>> sec. 1 at 14 March 2007; 'East Timor Independence Issue Raised', *Boston Globe*, 28 January 1999, at A10, available at [http://www.boston.com/dailyglobe2/028/nation/East\\_Timor\\_independence\\_issue\\_raised+.shtml](http://www.boston.com/dailyglobe2/028/nation/East_Timor_independence_issue_raised+.shtml) at 10 February 2007.

17 John I Charney, 'Self-Determination: Chechnya, Kosovo, And East Timor', (2001) 34 *Vanderbilt Journal Of Transnational Law* 455; Joel C Beauvais, 'Benevolent Despotism: A Critique Of UN State-Building In East Timor', (2001) 33 *New York University Journal of International Law and Politics* 1101; Tania Voon, 'Closing The Gap Between Legitimacy And Legality Of Humanitarian Intervention: Lessons From East Timor And Kosovo', (2002) 7 *UCLA Journal of International Law and Foreign Affairs* 31.

18 The exact number of protestors killed remains uncertain and ranges from 250 to 280. See e.g. Voon, n 17, at 52; Stephen McCloskey, 'Introduction: East Timor—From European to Third World Colonialism' in Paul Hainsworth & Stephen McCloskey eds, *The East Timor Question: The Struggle for Independence from Indonesia* 1, 7 (New York: I B Taurus, 2000); John Pilger, 'Death of a Nation: The Timor Conspiracy', Documentary (1994, updated 1999) transcript with figures available at <http://www.johnpilger.com/page.asp?partid=17> at 16 October 2007.

19 As above, n 18.

### III SELF-DETERMINATION: A LEGAL RIGHT ON A SLIPPERY SLOPE

There is uncertainty about the origins of the principle of self-determination. Some scholars trace the concept to the time of the Greek city states,<sup>20</sup> while others attribute the principle of self-determination to the French and American revolutions.<sup>21</sup> However the maturation of the principle dates to the redrawing of the map of Europe and creation of the League of Nations in the immediate aftermath of World War I.<sup>22</sup> There is little controversy that US President Wilson 'elevated the principle of self-determination to an international level'<sup>23</sup> through his Fourteen Points,<sup>24</sup> recognising 'that every people has a right to choose the sovereignty under which they shall live...'<sup>25</sup>

The idea underlying 'respect for the...self-determination of peoples,'<sup>26</sup> by drawing international borders around them was a hope that it would be possible to create inherently peaceful nations. The League of Nations implicitly accepted the principle of self-determination through articulation of a mandate system that granted States guardianship rather than sovereignty over territories. Subsequently after World War II the principle was explicitly incorporated into the United Nations Charter.<sup>27</sup>

In the post-World War II period, the principle of self-determination was invoked by colonial territories in the process of separating from their

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20 James Falkowski, 'Secessionary Self-Determination: A Jeffersonian Perspective' (1991) 9 *Boston University of International Law Journal* 209, 212.

21 Claudia Saladin, 'Self-Determination, Minority Rights and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic' (1991) 13 *Michigan Journal of International Law* 172, 173.

22 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press; Cambridge, 1995) 14-27.

23 Halim Morris, 'Self-Determination: An Affirmative Right or Mere Rhetoric?' (1997) 4 *ILSA Journal of International & Comparative Law* 201, 203.

24 President Woodrow Wilson, 'Address before the League to Enforce Peace' (27 May 1916), reprinted in 53 *Congressional Records* 8854 (29 May 1916); also set out in Lawrence T Farley, *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* 5 (1986).

25 As above, n 24.

26 Art 1, para 2, Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945 [UN Charter].

27 The UN Charter calls on member states 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...'. UN Charter art 1, para 2. It also creates a trusteeship system designed to 'promote the progressive development of the inhabitants of the trust territories toward self-government or independence, taking into account the freely expressed wishes of the peoples concerned; and requiring members to become the administering powers and protect the interests of those countries whose people had not yet attained self-government. UN Charter art 76.

colonisers.<sup>28</sup> This fell solidly in the 'external' dimension<sup>29</sup> of the principle of self-determination which considers that inhabitants of colonised territories constituted separate communities from their overlords and were prepared to determine their own future in the international community. The UN Charter's explicit recognition of the principle of self-determination also encompassed the 'internal' dimension which recognises minorities and indigenous people living within existing countries as a group made up of individuals that can freely associate on the basis of a social contract.<sup>30</sup> However controversy erupted with some scholars feeling the right extended only to colonies or areas subject to foreign control<sup>31</sup> i.e. 'external self-determination' which is based on the 'salt-water' test whose pivot is that the colonial power is distant from the colonised people in both geographic and cultural terms, which gives people subject to colonisation or foreign occupation the right to govern their own affairs free from outside interference.<sup>32</sup> Others disagreed saying that the right to self-determination belongs to all peoples, including minorities and indigenous people living within existing countries,<sup>33</sup> the pivot of this being the human rights system which emphasises the importance of collective human rights (third generation rights) of which self-determination sits at the top of the pile.

The two dimensions regarding self-determination mentioned above led to a cleavage of the principle of self-determination into two spectrums in international law: internal which grants minorities and indigenous people

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28 See generally Gerry J Simpson, 'The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255; Guyora Binder, 'The Case for Self-Determination' (1992-1993) 29 *Stanford Journal of International Law* 223.

29 The right of self-determination played a significant role in emancipating territories and dominions from colonial domination. The relationship between the right and the process of twentieth century decolonisation became so close that some came to believe that self-determination did not apply beyond 'salt-water' colonial situations i.e. where the colonial power was distant from the colonised people in both geographic and cultural terms. See generally Héctor Gros Espiell, 'The Right to Self-Determination: Implementation of United Nations Resolutions' (E/CN.4/Sub.2/405, United Nations, 1980); Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (The Hague: Martinus Nijhoff, 1982).

30 Kamal S Shehadi, 'Ethnic Self-Determination and the Break-up of States', *The Adelphi Papers*, No. 283, December 1993, 5.

31 Sam Blay, 'Self-Determination: A Reassessment in the Post Communist Era', (1994) *Denver Journal of International Law & Policy* 275; Gregory H Fox, 'Self-Determination in the Post Cold War Era: A New International Focus?' (1995) 16 *Michigan Journal of International Law* 733.

32 Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) 49.

33 See e.g. Edward A Laing, 'The Norm of Self-Determination, 1941-1991', (1992) 22 *California Western International Law Journal* 209, 248.



control over their own destinies and external which grants people subject to colonization or foreign occupation the right to govern their own affairs free from outside interference.<sup>34</sup> Internal self-determination 'regulates relations between rulers and ruled within the community which inhabits a defined territory'<sup>35</sup> while external self-determination 'regulates relations between a self-defined community and the outside world.'<sup>36</sup> Against this backdrop the principle of self-determination acquired a dichotomous role; a vehicle for justice that satisfies the aspirations for independence for colonised and oppressed peoples, but also a threat to the extant world order's preservation of the approved political and legal order in the case of statehood for national minorities in light of the *uti posseditis*<sup>37</sup> principle which militates against fragmentation of sovereignty.<sup>38</sup> In essence, there is, and continues to be, a significant tension underlying United Nations' doctrines concerning self-determination, and international concern over the secession of ethnic minorities from existing sovereign states.

Commencing in 1960 against the backdrop of numerous colonial territories increasingly casting off the shackles of colonisation or agitating for independence,<sup>39</sup> the evolution and maturation of the principle of self-determination in international law was cemented by three General Assembly resolutions, the salient provisions of which will be shortly outlined. On 14 December 1960, the General Assembly adopted Resolution 1514 (XV), the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, by a vote of ninety to none with eight abstentions, being the then Soviet Bloc countries and South Africa.<sup>40</sup> The resolution stated that all people have the right to self-determination and with decolonisation considered fundamental,<sup>41</sup> it called on administering powers of trust and for non-self-governing territories to take immediate steps to transfer, without reservation, all powers to the peoples of such

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34 Shehadi, above n 30, at 4.

35 Shehadi, above n 30, at 4.

36 Shehadi, above n 30, at 4.

37 *Uti possidetis juris* is a principle of international law that states that newly formed states should have the same borders that they had before their independence. This principle justifies the maintenance of borders imposed upon colonial peoples by imperial powers. It strongly suggests to claimant peoples that the international community only countenances and respects the assertions of group identity made by existing 'nations' within existing states.

38 Cassese, above n 9, at 165-204.

39 Cassese, above n 9, at 165-204.

40 See Declaration on the Granting of Independence to Colonial Countries and Peoples, GAR 1514, UN GAOR, 15th Sess, Supp. No. 16, at 66, UN Doc A/4684 (14 December 1960) proclaiming the need to solemnly bring to a speedy and unconditional end colonialism in all its forms and manifestations [Declaration on Granting Independence].

41 Declaration on Granting Independence, above n 40.



territories 'in accordance with their freely expressed will and desire.'<sup>42</sup> The resolution did not stop at rhetoric. Article 6 provided that member states 'continue to wage a vigorous and sustained campaign against activities and practices of foreign economic, financial and other interests operating in colonial Territories which are detrimental to the interests of the population.'<sup>43</sup> A day after the adoption of Resolution 1514, the General Assembly reaffirmed the General Assembly's proclamation spelled out in Resolution 1514 by outlining principles for determining whether a territory was a non-self-governing territory.<sup>44</sup> A decade after Resolutions 1514 and 1541, the principle of self-determination within territories was entrenched as a principle of international law with the passage in the General Assembly of Resolution 2625 (XXV), entitled *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*.<sup>45</sup> The enumerated goals of the latter Declaration included the need to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.<sup>46</sup>

In the author's opinion however, these three resolutions passed by the General Assembly articulating the principle of self-determination were biased towards the then prevalent climate of decolonisation, with a seeming underlying philosophy and assumption that colonial western powers were the main danger to self-determination thus an implicit inclination towards 'external' self-determination. This dynamic inevitably sidelined 'internal' self-determination which gives minorities and indigenous people control over their own destinies. East Timor would soon provide a novel scenario that would subsequently limit its ability to derive the benefits of the three explicit resolutions. This is primarily owing to the confusion revolving around the scope and character of self-determination and in particular the cleavage identified above between 'internal' and 'external' self-determination.<sup>47</sup>

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42 Declaration on Granting Independence, above n 40.

43 Declaration on Granting Independence, above n 40. For a detailed analysis see Sue Rabbitt Roff, 'The Contemporary International Law of Territorial Rights of Nations and Peoples', in John R Jacobson ed, *The Territorial Rights of Nations and Peoples: Essays From The Basic Issues Forum*, (Lewiston: Edwin Mellen Press, 1989) 5.

44 Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, GA Res. 1541, UN GAOR, 15th Sess, Supp. No. 16, at 29, UN Doc A/4684 (1960).

45 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GAR 2625 (XXV) UN GAOR, 25th Sess, Supp. No. 28, UN Doc A/8028 (1970) [Declaration on Principles].

46 Declaration on Principles of Friendly Relations, above n 45.

47 Edward A Laing, 'The Norm of Self-Determination, 1941-1991' (1992) 22 *California Western International Law Journal* 209, 248.

In the case of East Timor, its right to self-determination as a Portuguese colony was clear-cut especially considering that it had held the status of a non-self-governing territory according to the UN<sup>48</sup> and Portugal was recognised as the administering power.<sup>49</sup> However Portugal's abandonment of East Timor and the subsequent invasion and annexation by Indonesia in 1975 muddied the clear-cut path to external self-determination since Portugal was rendered neither a physical occupier nor governor of East Timor with that role having been usurped by Indonesia's invasion, proclamation of sovereignty and its subsequent entrenchment of its control and authority. Essentially then, the East Timorese quest for self-determination was blurred and indefinable not falling squarely in either of the two recognised spectrums mentioned above in defining a 'people' in the context of nationalism and self-determination.<sup>50</sup> Naturally the dynamics of the latter were redundant but of particular concern was the fact that even the safeguards that would have flowed naturally from the internal dimension were watered down by the reality that Indonesia could legitimately claim that the inhabitants of East Timor were culturally indistinct from the inhabitants of West Timor—which is part of internationally recognised Indonesian territory. Further the East Timorese were not a culture specific to the artificial territorial boundaries imposed by Dutch and Portuguese authorities.<sup>51</sup> Effectively, the East Timorese quest for self-determination was caught up in a legal and practical conundrum which served to undermine the protective mechanisms of international law available.

Indonesia in the face of international opposition (but with tacit support of the West) claimed that no process of self-determination was required in the territory, apart from that already coordinated by the Indonesian government and its forces of occupation.<sup>52</sup> Self-determination of the East Timorese, Indonesia claimed, was achieved through incorporation of their territory into Indonesia.<sup>53</sup> The source of this assertion was the political exercise stage managed by Indonesia in July 1976 subsequent to the military invasion when

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48 See GAR 1542, UN GAOR, 15th Sess, Supp. No. 16, at 30, UN Doc A/4684 (1960) (naming Timor and dependencies as Portuguese territory); GAR. 36/50, at para 3 (naming Portugal administering authority); East Timor, 1995 ICJ at 90 (declaring East Timor remains non-self-governing territory).

49 UN GAOR 1542, above, n 48.

50 'Internal' (in the sense of a distinct clearly defined minority exercising self-determination) and 'external' (in the sense of the 'salt-water' test as a distant colonial possession). See above notes 29, 30 & 32.

51 Robert Cribb & Colin Brown, *Modern Indonesia: A History Since 1945 (The Postwar World)* (New York: Longman, 1995) 5.

52 See Ali Alatas, 'East Timor: De-Bunking the Myths Around a Process of Decolonization', *Indon. News*, 20 March 1992, at 1, 4; Mark Aarons & Robert Domm, *East Timor: A Western Made Tragedy* (Sydney: The Left Book Club, 1992) 66.

53 Alatas, above n 52.

the people of East Timor 'exercised their right of self-determination' through a hand-picked 'People's Assembly' which formally requested integration with Indonesia.<sup>54</sup> This led then Indonesian President Suharto to sign the Bill of Integration on 17 July 1976, declaring East Timor as Indonesia's 27th province. The reality is that the December invasion and the armed incursions that preceded it were the culmination of a campaign initiated many months earlier by the Suharto military regime to prevent the emergence of an independent state in place of a Portuguese colonial regime that had maintained control of the eastern half of the island of Timor. The annexation of East Timor through use of force added another dimension to the issue of East Timor self-determination.

#### IV THE NEXUS OF 'AGGRESSIVE' USE OF FORCE AND SELF-DETERMINATION

In the aftermath of Indonesia's invasion of East Timor, General Assembly and Security Council resolutions repeatedly called upon member states not to recognise Indonesia's claim and to respect the territorial integrity of East Timor. Commencing in 1975, UN General Assembly Resolution 3485 (XXX) affirmed Portugal as the 'administering power' for East Timor,<sup>55</sup> (the first of eight UN General Assembly resolutions to call for Indonesian withdrawal from the territory).<sup>56</sup> The UN Security Council shared the same view as the General Assembly with Resolution 384 of 22 December 1975 also calling for 'all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination.'<sup>57</sup> The following year, Security Council Resolution 389 unanimously condemned the Indonesian invasion.<sup>58</sup>

Despite a raft of UN resolutions that were critical of Indonesian action, condemnation of the occupation became progressively weaker over the years mainly because Western powers saw Indonesia as a bulwark against communism and as a result maintained a studious policy of silence which extended to Indonesia's own bloody domestic purge of thousands of suspected communists and sympathisers.<sup>59</sup> Abandoned by the Portuguese and its claims for self-determination largely treated by major Western powers

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54 Aarons & Domm, above n 52.

55 UN GAOR 3485, above n 6.

56 UN GAOR 3485, above n 6. For a crisp incisive analysis of East Timor's march to statehood, see R S Clark, 'The Decolonisation of East Timor and the United States Norms on Self-Determination and Aggression' (1980) 7 *Yale Journal of World Public Order* 244.

57 UN SCOR 384, above n 6.

58 UN SCOR 389, above n 6.

59 See above notes 4, 9 & 10.

as subordinate to geopolitics,<sup>60</sup> East Timorese resistance movements took to arms and maintained a guerrilla campaign against the Indonesian army throughout the long occupation during which much of the civilian population lived in an atmosphere of repression and violence.<sup>61</sup>

In the face of Indonesia's continued assertion of sovereignty over East Timor the matter of the use of force which had delivered East Timor to Indonesia continued to be a thorny issue. Indonesia's military occupation remained politically and legally unacceptable with the repressive rule of Indonesia increasingly hardening international sentiment. Politically this was clear from the UN resolutions calling upon all member states to respect the territorial integrity of East Timor by denying recognition to Indonesia.<sup>62</sup> In addition through the long occupation, East Timor continued to feature annually on the United Nations General Assembly agenda as well as in the list of non-self-governing territories within the meaning of Chapter XI of the UN Charter.<sup>63</sup> On the legal front, In the Case Concerning East Timor, the International Court of Justice ('ICJ') effectively stated that if a non-self-governing territory is entitled to the right of self-determination, that right is not extinguished due to forcible intervention by a third party, by the passage of time, or by failed attempts at decolonisation.<sup>64</sup> The strongest statement was offered by Judge Weeramantry in his dissenting opinion. He stated that the Friendly Relations Doctrine, contained in the annex to UN Resolution 2625 (XXV), mandates that '*no territorial acquisition resulting from the threat or use of force shall be recognised as legal*'.<sup>65</sup> In effect, if the use of force is not recognised as legal, any consequences flowing from the illegal use of force would also necessarily be illegal.

As noted in this section, the political and legal dimensions of Indonesia's invasion and its continued denial of East Timor's right to self-determination under international law were clear-cut. However despite the majority of states passing a flurry of subsequent resolutions calling for non-recognition, East Timor continued to labour under the oppressive and bloody rule of Indonesia. While self-determination cannot be legitimately

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60 See above notes 4, 9 & 10.

61 See generally Robert Cribb & Colin Brown, *Modern Indonesia: A History Since 1945 (The Postwar World)* (New York: Longman, 1995).

62 UN East Timor Resolutions, above n 6.

63 East Timor had been declared a non-self-governing territory. See GAR 1542, UN GAOR, 15th Sess, Supp. No. 16, para 1, UN Doc A/4684 (1961).

64 Case Concerning East Timor (Portugal v Australia) (Judgment), 1995 ICJ 90 (June 30) 90, 97 (holding East Timor remains non-self-governing territory with right to self-determination).

65 Declaration on Granting of Independence, above n 40 at 125 [Emphasis added by author].

imposed by force, Indonesia's cultural ties and undeniable geographic proximity to the territory of East Timor made integration the most sensible political outcome in the eyes of onlookers reducing East Timor to a pawn in a complex game of political and economic chess.

## V SELF-DETERMINATION IN THE SHADOW OF REALPOLITIK

While international realpolitik played a key role in the seeming tacit acquiescence of Indonesia's invasion of East Timor, regional geopolitics sealed its fate for close to three decades. Effective control of the territory served as a basis for international acceptance of Indonesia's actions.<sup>66</sup> Though the international community widely held the view that Indonesia held East Timor illegally,<sup>67</sup> few concrete measures were taken to sanction the delinquency. With the Cold War in full force and communism advancing steadily in Indochina,<sup>68</sup> 'Western nations served their best interests at that time by supporting Indonesian annexation of East Timor, rather than allowing East Timor to fall prey to even the most remote possibility of Communist or Marxist control.'<sup>69</sup> Western support and the adoption of a policy of silence bolstered Indonesia's confidence with the government publicly announcing that it would not tolerate the possibility of East Timor's independence.<sup>70</sup> Western support was not limited to silent approval, but backed up with a supply of planes and war equipment to fight Timorese resistance to Indonesian annexation.<sup>71</sup> In the poisonous political climate created by Soviet expansionism, Indonesia now had a perfect excuse both for the military invasion and subsequent annexation

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66 See generally Sevinc Carlson, *Indonesia's Oil*, (Boulder, Colorado: Westview Press, 1977); see also Natalie S Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case', (1996) 21 *Yale Journal of International Law* 305.

67 Clark, above n 56, at 71.

68 Magalhães, above n 16.

69 Julie M Sforza, 'The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, And Decolonization', (1999) 22 *Suffolk Transnational Law Review* 481, 488.

70 Magalhães, above n 16, at sec 5.

71 Anup Shah notes that:

Indonesia was a major site of U.S. energy and raw materials investment, an important petroleum exporter, strategically located near vital shipping lanes, and a significant recipient of U.S. military assistance. Documents found among State Department records at the National Archives elucidate the inner workings of U.S. policy toward the Indonesian crisis during 1975 and 1976. Besides confirming that Henry Kissinger and top advisers expected an eventual Indonesian takeover of East Timor, archival material shows that the Secretary of State fully understood that the invasion of East Timor involved the 'illegal' use of U.S.-supplied military equipment because it was not used in self-defence as required by law.

Anup Shah, 'Crisis in East Timor', 12 December 2001 available at <http://www.globalissues.org/Geopolitics/EastTimor.asp> at 14 October 2007.

in the name of regional stability and defence of the free world.<sup>72</sup> It was not lost on observers that Indonesia commenced a full-blown invasion of East Timor within two days of the then US President Gerald Ford and his Secretary of State Henry Kissinger meeting with Suharto in Indonesia.<sup>73</sup>

Prevailing realpolitik created fertile ground for States in the region to adopt a hard-nosed, pragmatic approach that neutralised the illegality of the situation. Considering the size of Indonesia, and its wealth of resources, economics pushed the law to the backseat. This meant that 'no countries in the region were prepared to accept any shifts in the balance of power or a breaking of economic ties with Indonesia over the fate of East Timor.'<sup>74</sup> The East Timorese quest for the right to self-determination was effectively subsumed by the dictates of politics and economics considering Indonesia's physical control of East Timor provided Western investors and regional neighbours with the excuse to continue to deal economically with Indonesia. The influence of realpolitik is symptomatic in Robert Pringle's observation regarding the United States' position. Writing four years after the annexation of East Timor, he noted that despite the existence of acrimonious debate between human rights and regional bureaux in the State Department, human rights considerations had not had any specific negative impact on dealings with Indonesia.<sup>75</sup>

The fate of East Timor was further sealed with the decision by Australia, a key regional power on the international stage, to abstain from voting in favour of and to even vote against East Timor's attempts at self determination. Though Australia had voted in favour of General Assembly Resolution 3485 of 12 December 1975, it abstained from the vote on Resolution 31/53 of 1 December 1976 and Resolution 32/34 of 28 November 1977. With General Assembly Resolution 33/39 of 13 December 1978, Australia shifted further from its earlier participation in the censure of Indonesian conduct. Australia voted against Resolution 33/39, and in connection with its vote, the Australian Department of Foreign Affairs stated, 'The text of the Resolution did not reflect a realistic appreciation of the situation in East Timor and no practical purpose was served by the Resolution.'<sup>76</sup>

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72 Magalhães, above n 16, at sec 2.

73 Carey, above n 16, at 5.

74 Stephanie A Paulk, 'Determination of Self in A Decolonized Territory: The Dutch, The Indonesians, and The East Timorese' (2001) 15 *Emory International Law Review* 267, 288.

75 See Robert Pringle, *Indonesia and the Philippines* (New York: Columbia University Press, 1980) 116.

76 Australian Department of Foreign Affairs, *Annual Report 1978 (1979)* 30, quoted in Christine M Chinkin, 'East Timor Moves to the World Court', (1993) 4 *European Journal of International Law* 206, 207 n 5.

At the beginning of 1978, Australia granted Indonesia de facto recognition.<sup>77</sup> In August of 1985, about ten years after Indonesia's invasion, Australia's then Prime Minister, Bob Hawke, formally recognised Indonesian sovereignty over East Timor.<sup>78</sup> In justifying the move, Hawke's position was clearly based on practical rather than legal considerations. Hawke suggested that it was a reality with which Australia had to come to terms noting that despite being 'critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognise de facto that East Timor [was] part of Indonesia.'<sup>79</sup> This recognition made Australia the only country to officially recognise Indonesia's sovereignty over East Timor.<sup>80</sup> With all these initiatives, Australia was positioning itself in pursuit of a more sinister national interest issue, the resources in the Timor Gap. By the end of 1989, the Australia Government had concluded a maritime delimitation treaty with Indonesia entitled 'Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia' (Timor Gap Treaty).<sup>81</sup> Under the bilateral treaty, the two countries agreed on seabed boundaries between Australia and East Timor and established a 'Zone of Cooperation' (which since 2001 has been re-named the more politically benign 'Joint Development Petroleum Area' or JDPA) for joint exploration and exploitation of the oil and gas resources in the waters.<sup>82</sup> Two years later the 'Timor Gap Treaty' between Australia and Indonesia came into force.<sup>83</sup>

After many years of indifference, the recognition of Indonesia's sovereignty over East Timor by Australia and the joint initiatives to exploit resources in the Timor Gap encouraged Portugal, the former colonial power which had abandoned East Timor, to take more proactive action. In the same year that the Timor Gap Treaty came into force, Portugal

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77 Case Concerning East Timor, above n 64, at 97 (quoting the then Australian Minister for Foreign Affairs).

78 'Key Dates in Australia Indonesia Relations', AAP Newsfeed, May 21, 1998, available in LEXIS, Intlaw Library, News File [Key Dates].

79 Case Concerning East Timor, above n 64, at 97.

80 'Background to the Timor Gap Treaty', AAP Newsfeed, August 20, 1998, available in LEXIS, Intlaw Library, News File [Background].

81 Thomas D Grant, 'East Timor, The UN System, And Enforcing Non-Recognition In International Law', (2000) 33 *Vanderbilt Journal of Transnational Law* 273, 299.

82 Michael Shane French-Merrill, 'The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached its International Obligations in Ratifying the Timor Gap Treaty', (2000) 8 *Cardozo Journal of International & Comparative Law* 285, 288-89; Jim Aubrey, 'Canberra: Jakarta's Trojan Horse in East Timor', in Paul Hainsworth & Stephen McCloskey eds, *The East Timor Question: The Struggle for Independence from Indonesia* (London-New York: I.B. Tauris Publishers, 2000) 133, 142.

83 Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, Australia-Indonesia, 1991 *Australia Treaty Series* No. 9.



viewing the treaty as a delict instituted proceedings against Australia and Indonesia before the ICJ.<sup>84</sup> The proceedings claimed in part that Australia, by entering into the Timor Gap Treaty with Indonesia, infringed East Timor's right to self-determination and permanent sovereignty over its natural resources, and infringed upon Portugal's rights as the administering power of the territory.<sup>85</sup>

## VI THE JUDICIAL DIMENSION: THE ICJ GETS BLIND-SIDED BY REALPOLITIK

The Portuguese proceedings, commenced before the ICJ in 1991, sought a declaration that Portugal's status with respect to East Timor and the rights of the people of East Timor to self-determination, territorial integrity and unity, and permanent sovereignty over its wealth and natural resources opposed Australia's treaty with Indonesia on the Timor Gap.<sup>86</sup> Four years later, on 30 June 1995, the ICJ ruled in a 14-2 decision that it could not exercise jurisdiction over the case because it would require the Court to determine the lawfulness of Indonesia's presence in and occupation of East Timor, as well as Indonesia's treaty-making power over East Timor.<sup>87</sup> In light of Indonesia's failure to submit to the Court's jurisdiction, the ICJ declined to exercise jurisdiction based on the absence of Indonesia, a necessary party, whose legal interest would have been implicated upon adjudication on the merits. The majority decided it was unable to adjudicate the issue since the violations Australia allegedly perpetrated by entering into the treaty with Indonesia were linked with the question of the legitimacy of Indonesia's signing of the treaty.<sup>88</sup>

Though the ICJ did not decide the issue, disturbingly the majority of judges supported the notion that 'Indonesia had manifested its sovereignty

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84 For initial motions in the case, see *Case Concerning East Timor (Portugal v Australia) (Initial Motions)*, 1993 ICJ 32 (May 19); *Case Concerning East Timor (Portugal v Australia)*, 1992 ICJ 228 (June 19); *Case Concerning East Timor (Portugal v Australia)*, 1991 ICJ 9 (May 3).

85 See *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia*, Dec. 11, 1989, *Australia-Indonesia*, 29 I.L.M. 475 (1990); *East Timor*, 1995 ICJ 90 at 98; GA Res 1803, UN GAOR, 17th Sess, Supp. No. 17, at 15, UN Doc A/ 5217 (1962) [GA Res 1803].

86 *Case Concerning East Timor*, above n 64, at 92.

87 *Case Concerning East Timor*, above n 64, at 100; see also Bello & Bekker, 'Treaty of 1989 Between Australia and Indonesia Concerning the Gap-Existence of Legal Dispute Between Portugal and Australia-Objections to Jurisdiction-Effect of Court Ruling on Absent Third Parties—Right to Determination as Right Erga Omnes—Status of East Timor as Non-Self-Governing Territory', (1996) 90 *American Journal of International Law* 94.

88 See Brian F Fitzgerald, 'Portugal v Australia: Deploying the Missiles of Sovereign Autonomy and Sovereign Community', 37 *Harvard International Law Journal* 260, 264.

and was, through *animus occupandi*, the sovereign power of East Timor.<sup>89</sup> The ICJ majority went further by embracing the argument advanced by Australia that Portugal no longer exclusively controlled East Timor and that the power over East Timor had passed, under general international law, to Indonesia.<sup>90</sup> In the words of Michael S Merrill-French:

The crux of Australia's argument, therefore, was that sovereignty is a factual determination. By invading East Timor and occupying all the political and economic centers of the island for over 20 years, Indonesia had exercised enough dominion to be regarded as the sovereign power of East Timor. Australia, while not approving the means by which this sovereignty was brought about, declared that it would be unreasonable not to consider Indonesia as the sovereign power given the facts of the situation.<sup>91</sup>

In all fairness, the ICJ majority did decide that in concluding the Timor Gap Treaty, Australia in no way impeded the negotiation of the issue (of East Timorese self-determination) by the parties directly concerned (namely Indonesia and Portugal).<sup>92</sup> The majority went on to note that the 'conclusion or implementation of the Timor Gap Treaty [did not] hinder any act of self-determination of the people of East Timor that might result from the negotiations' with the net result that 'Australia did nothing to affect the ability of the people of East Timor to make a future act of self-determination'.<sup>93</sup> However, it was the dissenting opinions by Judges Weeramantry and Skubiszewski which grappled with the hard legal issues.

The two dissenting judges asserted that recognition of the territorial changes effectuated by Indonesia's invasion was an international delict arguing that Australia violated a general duty to the international community by recognising Indonesia's claim of sovereignty.<sup>94</sup> Their major criticism was that no nation, other than Australia, recognised Indonesia's illegal annexation. Since the Indonesian invasion violated international law, depriving the East Timorese of the right of self-determination, Indonesia could not be regarded as sovereign of East Timor as a matter of law. Their conclusion was that Australia violated obligations due to the international community by recognising Indonesia's actions. Judge Skubiszewski further noted that, in light of Australia's membership in the UN and the corresponding duty to respect Portugal's claim as administering power in East Timor, as well as the right of the East Timorese to self-determination, Australia had breached its duties under international law.

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89 French-Merill, above, n 82, at 292.

90 Case Concerning East Timor, above n 64, at 101-03.

91 Case Concerning East Timor, above n 64, at 293.

92 Case Concerning East Timor, above n 64, at 373.

93 Case Concerning East Timor, above n 64, at 374-75.

94 Case Concerning East Timor, above n 64, at 172.

Three years after the ICJ judgment, the political machine that had been slowly coming to life finally clinched a break-through. In August 1998, the Indonesian and Portuguese governments agreed in UN-brokered negotiations to work towards autonomy for East Timor.<sup>95</sup> This was followed by Australia's recognition of the right of the East Timorese to self-determination on 5 January 1999.<sup>96</sup> Five months later, Indonesia and Portugal signed an agreement requesting the UN to conduct a ballot in East Timor enabling the East Timorese to choose between autonomy and independence.<sup>97</sup> On 30 August 1999, after UN-brokered negotiations between Indonesia and Portugal,<sup>98</sup> a popular referendum on East Timor's future status was held under the auspices of the UN Mission to East Timor (UNAMET)<sup>99</sup> with an overwhelming majority voting for independence from Indonesia. On 20 May 2002, 'After more than four centuries of Portuguese colonial rule, followed by twenty-four years of brutal occupation by Indonesia, and finally a two-year period of UN interim administration, the people of East Timor celebrated their long-awaited independence.'<sup>100</sup>

## VII CONCLUSION

Despite continuing debate regarding the principle of self-determination, the author avers that authority from most of the sources of international law supports the conclusion that self-determination is a norm of *jus cogens* imposing binding obligations on all nation states.<sup>101</sup> Considering

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95 Report of the Secretary-General, UN GAOR, 53d Sess., UN Doc A/53/349 (1998); Human Rights Watch, *World Report* (1999).

96 Sforza, above n 69, at 146.

97 See generally Agreement Between Indonesia and Portugal on the Question of East Timor, UN SCOR, 53d Sess, Annex I, at 4, UN Doc S/1999/513 (1999); Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding the Modalities for the Popular Consultation Through a Direct Ballot, UN SCOR 53d Sess, Annex II, at 24, UN Doc S/1999/513 (1999); Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding Security Arrangements, UN SCOR, 53d Sess, Annex III at 29, UN Doc S/1999/513 (1999).

98 Alexander Downer, 'East Timor—Looking Back on 1999' (2000) 54 *Australia Journal of International Affairs* 5, 5-6; James Cotton, 'The Emergence of an Independent East Timor: National and Regional Challenges', (2000) 22 *Contemporary Southeast Asia* 1, 2-6.

99 UNAMET was authorized on 11 June 1999, under UN Security Council Resolution 1246. UN SC, 4013th mtg, UN Doc. S/RES/1246 (1999), available at <http://www.un.org.library.80/Docs/sres/1999/99sc1246.htm> at 5 April 2007. For an account of the challenges faced by the mission, see also *Report of the Secretary-General on the Question of East Timor*, UN SC, UN Doc S/1999/803 (20 July 1999); *Report of the Secretary-General on the Question of East Timor*, UN SC, UN Doc S/1999/862 (9 August 1999).

100 Beauvais, above n 15, at 1102.

101 Morris, above n 23, at 204.

that self-determination is a norm of customary international law,<sup>102</sup> the East Timorese should be seen in many ways as a people betrayed by the international community in light of the *realpolitik* factors identified above. As M. S. French-Merill notes, 'Indonesia's illegal use of force and its interference with the self-determination of the East Timorese were regarded as violations of general international law as well as violations of UN resolutions. As a consequence, the United Nations called upon member states not to recognise the Indonesian annexation.'<sup>103</sup>

The author deems the schism between external and internal self-determination as a worry and argues that it should be shorn of geopolitics. While the principle of *uti posseditis* has a real role in international law, it should not be a basis for inaction and deliberate subversion. When the Wilsonian principles elevated the matter to the international law agenda and the UN Charter outlawed aggressive use of force the hope of the international community was that brute force was no longer an accepted avenue to neither acquire territory by force nor snuff out the aspirations of a people to self-determination. East Timor as the latest entrant into the community of nations despite its small size and poverty should be a lesson and a reminder that self-determination is a right that should be both adequately protected and safeguarded where the circumstances call for it.

As the analysis of this Article shows the constant evolution of the right to self-determination, and its survival as a guiding principle of international law takes on a turbulent twist for better or for worse where *realpolitik* comes into play. East Timor is a classic example but history and the present is littered with many other examples. The author, by way of illustration, will note some compelling examples from around the world. In Europe, in the 1990s, Western powers gave covert and overt support to the serial secession of the constituent Republics of Yugoslavia, but the matter of Kosovo remains unresolved owing to political stand-off between major powers; in the Middle East, the right is often referenced in the Israeli-Palestine issue but the resolution to this Kafkaesque conflict remains stranded in a polarised political quagmire; in Asia, Kashmir continues to be a dangerous lightning rod in the Indian sub-continent between two nuclear powers (India and Pakistan); in Africa, Sudan continues to soak its land in the blood of its people's despite peace deals and power sharing protocols.

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102 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 114-28; 113; J Klabbers & R Lefeber 'Africa: Lost Between Self-Determination and Uti Possidetis' in C Brolmann *Peoples and Minorities in International Law* (The Hague: Martinus Nijhoff, 1993) 39-41; Manfred Lachs, 'The Law in and of the United Nations' (1960-61) 1 *Indian Journal of International Law* 429.

103 French-Merill, above n 82, at 300.

There is little doubt that self-determination is complex in the sense that it is at once a legal norm, an ideology and a form of politics. Though self-determination has taken on greater legal power, and has come to offer the hope of emancipation to more and more peoples suffering from oppression, it has been often hampered by the dominance of states in the global arena. Many states unfortunately remain determined to limit the capacity of self-determination in order to manage perceived threats to territorial or regional dominance. However, through rhetoric and practice peoples seeking control over their own destinies continue to harness self-determination in their struggles in light of its emancipatory potential.

Self-determination should be seen as a form of nation-building. It is the senseless bloodshed and human rights violations that often accompany contested cases of self-determination or those atrocities cushioned by *realpolitik* in relatively uncontested cases that the international community should both address and seek to avoid. Road plans of peace to nowhere, power-sharing deals that last only as long as it takes to re-arm should be shunned in situations where bolstering frameworks such as constitutionalism, development and democracy, resource sharing and promoting human rights norms can help assuage the propensity towards violence. History has shown that whenever the international community repeats the same mistake, the 'price' invariably goes up. The author concedes that this is a rather pessimistic way to end the Article but trusts that the reader will acknowledge the complexities of the self-determination issue, in any case on a more optimistic note; a problem identified is a problem half-solved.